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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218363
Party	Defendant Mr. Foamer, Inc.
Correspondence Address	ISABELLE JUNG CAREY RODRIGUEZ GREENBERG & O'KEEFE LLP 7900 GLADES RD STE 520 BOCA RATON, FL 33434-4105  pto@crgolaw.com;ijung@crgolaw.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Isabelle Jung
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Date	10/26/2014
Attachments	Motion_Dismiss.pdf(172717 bytes ) ExhibitsAtoC.pdf(774503 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

NEW WAVE INNOVATIONS INC.

vs.

MR. FOAMER, INC.

/

Opposition No. 91218363

**MR. FOAMER’S MOTION TO DISMISS THE OPPOSITION**

MR. FOAMER, INC. (“MR. FOAMER” or “Applicant”) submits this Motion to Dismiss the Opposition (“Opposition”) filed by NEW WAVE INNOVATIONS, INC. (“NEW WAVE” or “Opposer”) and submits its Memorandum of Law in support of its Motion to Dismiss (the “Motion”) the Opposition.

**I. SUMMARY OF ARGUMENT**

The Opposition should be dismissed by the United States Patent and Trademark Office Before the Trademark Trial and Appeal Board (the “Board”) because the Opposition fails to state a claim for relief as it is devoid of a valid ground for challenging the registration of Trademark Application Serial No. 86/108,666 filed on November 2, 2013 (the “Application”). More specifically, the Opposition fails to state a claim under Section 2(d) of the Trademark Act, under Section 2(a) of the Trademark Act, for fraud on the United States Patent and Trademark Office (“USPTO”) and for quasi-estoppel.

**II. MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

To withstand a motion to dismiss, a notice of opposition must allege that (1) the opposer has standing to challenge the application, and (2) a valid ground exists for seeking to oppose registration. *Compagnie Gervais Danone v. Precision Formulations, LLC*, 89 U.S.P.Q.2d 1251, 1254 (TTAB 2009). Further, to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 552 U.S. 662, 678 (2009) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570

(2007). Despite the requirement that the Trademark Trial and Appeal Board (“TTAB”) must treat all well-pleaded allegations as true, there are facts the TTAB may consider when a party has filed a motion to dismiss, including facts such as the filing date and the filing basis of a trademark application, as these facts are not subject to proof, and the TTAB may look to office records for such facts to determine if a party's allegations are well pleaded. *Compagnie Gervais Danone* at 1256.

**A. THE OPPOSITION SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE OF CLAIM UNDER SECTION 2 (D) OF THE LANHAM ACT**

**1. Section 2 (d) of the Lanham Act Requires Proof of Priority of Use of the Mark**

Section 2 (d) of the Lanham Act prohibits registration of a trademark where the mark was “previously used in United States by another”. 15 U.S.C. 1052(d). Therefore, in a trademark opposition where one seeks to prevent registration of a mark, the opposer must establish that the opposer has priority of use of the mark. Otherwise, the opposer cannot prevail on its likelihood of confusion claim because priority of use is a “necessary element of any claim under Trademark Act § 2(d)”. *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1117 (TTAB 2209). In this regard, in *Syngenta*, the TTAB further held that “we need not reach the issue of likelihood of confusion because without proof of priority, opposer cannot prevail.” *Id.* Of note, in intent-to-use trademark applications, the applicant may rely on the filing date of the application as a constructive date of first use in order to establish priority of use. *Compagnie Gervais Danone* at 1253.

**2. The Opposer Did Not Establish Priority of Use and Failed to State a Claim Under Section 2(d) of the Lanham Act**

The Notice of Opposition states that one of the grounds for the Opposition is the “priority and likelihood of confusion” under “Trademark Act Section 2(d)” (Notice of Opposition, p. 2). In the Opposition, the Opposer submits as evidence of use Application Serial Number 86/304,665 for MR. FOAMER (the “Opposer’s Word Mark”) and Application Serial Number 86/303,800 for CHRISTMAS WISHES FROM MR. FOAMER design mark (the “Opposer’s Design Mark”). In

this regard, the Opposer provides a copy of the filing receipts for the Opposer's Word Mark and for the Opposer's Design Mark (Opposition, Exhs. 1- 2). Opposer relies upon these two applications as the sole support for Opposer's claim that Opposer used the MR FOAMER Mark with a date of first use of "November/December 2011." (Opposition, p. 1 §1).

Yet, contrary to the allegation in the Opposition that the Opposer's Word Mark and the Opposer's Design Mark have been in use since "November/December 2011" (*id.*), the filing receipts for these applications clearly state that the Opposer's Word Mark and the Opposer's Design Mark have been in use since December 15, 2011. (Opposition, Exhs. 1- 2). Therefore, in determining priority of use, the Board may look at the alleged date of first use listed in the filing receipts attached to the Opposition (December 15, 2011) because the date of first use of the MR. FOAMER Mark listed in the Opposition is not well-pleaded. *See Compagnie Gervais Danone.*

Of great importance, since the filing of the Opposition, the USPTO has issued office actions in the application for the Opposer's Word Mark and in the application for the Opposer's Design Mark (a copy of these office actions are attached as Exhibit "A" and "B" respectively). In each office action, the trademark examiner rejected the specimens of use submitted by the Opposer and stated that these specimens did not show use of the mark in commerce in connection with the goods and/or services applied-for. Specifically, in the Opposer's Word Mark application, the trademark examiner stated:

Registration is refused because the specimen does not show the applied-for mark in use in commerce in connection with any of the goods and/or services specified in the application. 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a). Specifically, the specimen consists of a picture of a Christmas card bearing the mark. However, there is not a sufficient connection with the listed services of the application.

(Exh. A, p. 2).

Similarly, in the Opposer's Design Mark, the examiner stated that:

Registration is refused because the specimen does not show the applied-for mark in use in commerce in connection with any of the goods and/or services specified in the application. 15 U.S.C. §§1051, 1127; 37 C.F.R.

§§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a). Specifically, the specimen consists of a picture of a Christmas card bearing the mark. However, there is not a sufficient connection with the listed services of the application.”

(Exh. B, p. 2).

Therefore, the trademark examiner made a determination that the specimens of use offered in the application for the Opposer’s Word Mark and the Opposer’s Design Mark did not show use of the Opposer’s Word Mark and the Opposer’s Design Mark in commerce. These findings by the trademark examiner directly contradict the alleged “use” basis and date of first use claimed by the Opposer in the Opposition and in the applications for the Opposer’s Word Mark and the Opposer’s Design Mark

Because the office actions issued in the Opposer’s Word Mark and the Opposer’s Design Mark relate to the *filing basis* of these trademark applications, the Board may look to the USPTO records and consider these office actions and their findings to determine if the Opposer’s allegation of priority of use is well-pleaded. *See Compagnie Gervais Danone*.

On one hand, based on the office actions issued in the Opposer’s Word Mark and the Opposer’s Design Mark, **the filing basis** listed in the Opposer’s applications for the Opposer’s Word Mark and the Opposer’s Design Mark **is improper** as **no use in commerce was made by the Opposer**. On the other hand, the Application subject to this Opposition lists a date of first use of the MR. FOAMER Mark of **August 10, 2012** in connection with International Class 035 for “sale of car wash equipment and parts thereof including sale of equipment of others.” (See Filing Receipt for Application Serial No. 86/108,666 attached as Exhibit “C” to the Motion<sup>1</sup>). Therefore, based on these facts, the Opposer does not have priority of use of the MR. FOAMER Mark because the Opposer never used the MR. FOAMER Mark in commerce according to the

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<sup>1</sup> Of note, an incomplete copy of the filing receipt for the Application was attached to the Opposition. Therefore, the Applicant now attaches the full copy of the filing receipt for the Application to the Motion.

findings of the USPTO in the office actions issued in the Opposer's Word Mark and the Opposer's Design Mark.

Notwithstanding, in the event the Opposer's applications for the Opposer's Word Mark and the Opposer's Design Mark are considered by the Board to have been filed on an "intent-to-use" basis due to the findings of non-use by the USPTO, then the constructive date of first use for both the Opposer's Word Mark and the Opposer's Design Mark would be the date of filing of these applications, or **June 9, 2014** (see filings receipts for the Opposer's Word Mark and the Opposer's Design Mark, Opposition, Exhs. 1-2). As to the Application, the dates of first-use for Classes 035 and 037 are **August 10, 2012 and November 2, 2013** respectively (see Exh. C). As to Class 003 in the Application, this class was filed on an intent-to-use basis. As such, the constructive date of first use for Class 003 would be the filing date of the Application, or **November 2, 2013** (*id.*). As a consequence, the date of constructive use of the MR. FOAMER Mark by the Opposer is subsequent to any date of first use of the MR. FOAMER Mark by the Applicant. Thus, the Opposer did not establish priority of use of the MR. FOAMER Mark.

Therefore, the Opposer's claim under Section 2(d) of the Lanham Act fails because the Opposer did not establish priority of use of the MR. FOAMER Mark. In turn, the Board does not have to reach the issue of likelihood of confusion because without proof of priority, the opposer cannot prevail. *See Syngenta*. As a result, the Board should dismiss the Opposition for failure to state a claim under Section 2(d) of the Lanham Act.

**B. THE OPPOSITION SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE OF CLAIM UNDER SECTION 2 (A) OF THE LANHAM ACT**

**1. Section 2 (a) of the Lanham Act Requires Proof of a False Suggestion of a Connection with a Person or Institution**

Section 2 (a) of the Lanham Act prohibits registration of a trademark where that mark "falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols." 15 U.S.C. § 1052(a). Therefore, in a trademark opposition proceeding where the opposer seeks to prevent registration of a mark, the opposer has to establish the applicant's mark

falsely suggests a connection with a person or institution. *See* 15 U.S.C. § 1052(a). The rights protected under the Section 2(a) false suggestion provision are not designed primarily to protect the public, but to protect persons and institutions from exploitation of their persona. *Bridgestone/Firestone Research, Inc. v. Automobile Club De L'Ouest de la France*, 245 F.3d 1359, 1363 (Fed. Cir. 2001).

2. The Opposer Did Not Establish The Existence of a False Suggestion of a Connection and Failed to State a Claim Under Section 2(a) of the Lanham Act

In the Notice of Opposition, the Opposer lists as one of the grounds for opposition the existence of a “false suggestion of a connection” under “Trademark Act section 2(a)” (see Notice of Opposition, p. 2). However, this ground of opposition is not alleged and is not well-pleaded in the Opposition papers. In fact, nowhere in the Opposition does the Opposer allege the existence of a false connection of the MR. FOAMER Mark with a person or institution resulting in the exploitation of its persona by the Applicant. *See* 15 U.S.C. § 1052(a). *Also see Bridgestone*. As a consequence, the Opposer failed to state a claim of false suggestion of a connection under Section 2(a) of the Lanham Act. Consequently, the Board should dismiss the Opposition for failure to state a claim of false suggestion of a connection under Section 2(a) of the Lanham Act.

**C. THE OPPOSITION SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE OF CLAIM OF FRAUD AND QUASI-ESTOPPEL FOR WHICH RELIEF CAN BE GRANTED**

1. Fraud Requires Proof that the Applicant Made a False and Material Representation of Fact

Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with his application. *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986). Each class of goods or services in a multiple class application or registration must be considered separately when reviewing the issue of fraud, and judgment on the ground of fraud as to one class does not in itself require cancellation of all classes in a registration. *G&W Laboratories, Inc. v. G W Pharma Limited*, 89 U.S.P.Q.2d 1571 (TTAB 2009). Moreover, where one commits fraud, he may also become subject to the doctrine

of quasi-estoppel. This doctrine is also known as the duty of consistency and prevents one from repudiating an act or assertion that harmed another who reasonably relied on the act or assertion. *In re Baker Hughes Incorporated*, 215 F.3d 1297, 1302-1303 (Fed. Cir. 2000).

2. The Opposer Did Not Establish The Existence of Fraud and Failed to State a Claim for Fraud and Quasi-Estoppel

In the Opposition, the Opposer alleged that the statements contained in the Application are fraudulent because “there was no use of the MR. FOAMER mark by the applicant in August 2012, based upon its sworn testimony before the Federal District Court” and accused the Applicant to have fabricated the specimen of use filed with the Application (Opposition, p. 3, para. A). Moreover, the Opposer alleged that the Applicant was barred from registration by the doctrine of quasi-estoppel. In support of its allegations, the Opposer attached a copy of the affidavit of James McClimond, president of the Applicant’s company, in which James McClimond stated that: “Mr. Foamer does not use a trademark containing the terms MR. FOAMER in connection with the sale of any product” (Opposition, Exh. 3, para. 13). In further support, the Opposer attached excerpts from the hearing transcript of October 29, 2013 during which James McClimond testified that the Applicant had not used the term “MR. FOAMER” in connection with the sale of products (Opposition, Exh. 4, at 217:5-8).

Ironically, the Opposer accused the Applicant of committing fraud even though it is the Opposer who misstates the contents of the Application and seeks to confuse the Board as to the allegations of trademark use made by the Applicant. More particularly, the Applicant has applied for registration of the MR. FOAMER Mark in connection with three (3) classes: 1) International Class 003 for “car wash cleaning and polishing preparations” (goods) which was filed on an intent-to-use basis; 2) International Class 035 for “online retail store services featuring car wash equipment and parts thereof” (services) with a date of first use of August 10, 2012; and 3) International Class 037 for “installation and maintenance of car wash equipment and parts thereof” (services) with a date of first use of November 2, 2013. (See Exh. C). Importantly, two

classes in the Application relate to “services” (Classes 035 and 037) and only these classes claim a date of first use. (*Id.*) On the contrary, the third class listed in the Application pertains to “products” and was filed on an intent-to-use basis (Class 003). (*Id.*)

Here, the statements made by James McClimond in court (Opposition, Exh. 4) and in the Affidavit (Opposition, Exh. 3) are consistent with the statements made in the Application. Indeed, James McClimond stated that the Applicant had never used the MR. FOAMER Mark *in connection with the sale of any product*. (Opposition, Exh. 3, p. 2 para. 13) (emphasis added). To wit, the statement of James McClimond made at the aforementioned hearing and in the Affidavit is consistent with the filing basis for the one and only class of goods found in the Application. Indeed, Class 003 - the only class of goods/products found in the application - for “car wash cleaning and polishing preparations” was filed on an intent-to-use basis (Exh. C).

As to the services listed in the Application and their dates of first use, the Applicant never alleged that it did not use the MR. FOAMER Mark in commerce *in connection with services* in the past. Indeed, the Affidavit and the statement in court both state that the Applicant did not use the MR. FOAMER Mark in connection with “products”. Here, the Opposer only seeks to confuse the Board in an effort to succeed on its otherwise meritless fraud claim.

As a consequence, James McClimond’s statement in the Affidavit and during the hearing conform with the contents of the Application and no fraud was made in the Application as to the filing basis of any class of goods or services. The Applicant did not make a false and material misrepresentation of fact in the Application. In addition, the Applicant did not make assertions that the Applicant subsequently repudiated. *See In re Baker Hughes Incorporated*, 215 F.3d 1297, 1302-1303 (Fed. Cir. 2000). In fact, the assertions made by the Applicant have not been repudiated when the Applicant filed the Application. Instead, the filing bases of the various classes in the Application are in direct alignment with the prior statements made by the Applicant. Thus, the Opposer’s claims of fraud and quasi-estoppel are not well-pleaded as the Opposer cannot establish the elements of fraud or the elements of quasi-estoppel. As a result, the

Opposition should be dismissed because the Opposer failed to state a claim of fraud and for quasi-estoppel.

WHEREFORE, the Applicant respectfully requests that the Board dismiss the Opposition as the Opposition fails to state a claim upon which relief can be granted.

/Isabelle Jung/  
Isabelle Jung  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing Motion to Dismiss has been served on the Opposer New Wave Innovations, Inc. by electronic message sent to counsel for New Wave Innovations, Inc., John Faro, on October 26, 2014.

/Isabelle Jung/  
Isabelle Jung  
CRGO Law  
7900 Glades Road, Suite 520  
Boca Raton, FL 33434  
Phone: (561) 922-3845  
Fax: (561) 244-1062  
Email: [ijung@crgolaw.com](mailto:ijung@crgolaw.com)

## EXHIBIT A

**To:** NEW WAVE INNOVATIONS, INC ([Johnf75712@aol.com](mailto:Johnf75712@aol.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86304665 - MR. FOAMER - N/A  
**Sent:** 9/23/2014 1:29:22 PM  
**Sent As:** ECOM103@USPTO.GOV  
**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

<b>U.S. APPLICATION SERIAL NO.</b> 86304665	
<b>MARK:</b> MR. FOAMER	<b>*86304665*</b>
<b>CORRESPONDENT ADDRESS:</b> JOHN H. FARO, ESQ FARO & ASSOCIATES 1395 BRICKELL AVE STE 800 MIAMI, FL 33131-3302	<b>CLICK HERE TO RESPOND TO THIS I</b> <a href="http://www.uspto.gov/trademarks/teas/response">http://www.uspto.gov/trademarks/teas/response</a>  <a href="#">VIEW YOUR APPLICATION FILE</a>
<b>APPLICANT:</b> NEW WAVE INNOVATIONS, INC	
<b>CORRESPONDENT'S REFERENCE/DOCKET NO :</b> N/A <b>CORRESPONDENT E-MAIL ADDRESS:</b> <a href="mailto:Johnf75712@aol.com">Johnf75712@aol.com</a>	

**OFFICE ACTION**

**STRICT DEADLINE TO RESPOND TO THIS LETTER**

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW.

**ISSUE/MAILING DATE: 9/23/2014**

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62, 2.65(a); TMEP §§711, 718.03.

**SEARCH OF OFFICE'S DATABASE OF MARKS**

The Office records have been searched and there are no similar registered or pending marks that would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

However, applicant must address the following issue(s).

## **SPECIMEN DOES NOT SHOW USE WITH ANY SERVICES**

Registration is refused because the specimen does not show the applied-for mark in use in commerce in connection with any of the goods and/or services specified in the application. 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a). Specifically, the specimen consists of a picture of a Christmas card bearing the mark. However, there is not a sufficient connection with the listed services of the application.

An application based on Trademark Act Section 1(a) must include a specimen showing the applied-for mark in use in commerce for each international class of goods and/or services identified in the application or amendment to allege use. 15 U.S.C. §1051(a)(1); 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a).

Examples of specimens for goods may include tags, labels, instruction manuals, containers, and photographs that show the mark on the actual goods or packaging, or displays associated with the actual goods at their point of sale. *See* TMEP §§904.03 *et seq.* Webpages may also be specimens for goods when they include a picture or textual description of the goods associated with the mark and the means to order the goods. TMEP §904.03(i). Examples of specimens for services may include advertising and marketing materials, brochures, photographs of business signage and billboards, and website printouts that show the mark used in the actual sale, rendering, or advertising of the services. *See* TMEP §§1301.04 *et seq.*

Applicant may respond to this refusal by satisfying one of the following:

- (1) Submit a different specimen (a verified [“substitute” specimen](#)) that (a) was in actual use in commerce at least as early as the filing date of the application or prior to the filing of an amendment to allege use and (b) shows the mark in actual use in commerce for the goods and/or services identified in the application.
- (2) Amend the filing basis to [intent to use under Section 1\(b\)](#), for which no specimen is required. This option will later necessitate additional fee(s) and filing requirements such as providing a specimen at a subsequent date.

For an overview of *both* response options referenced above and instructions on how to satisfy either option online using the Trademark Electronic Application System (TEAS) form, please go to <http://www.uspto.gov/trademarks/law/specimen.jsp>.

/Sung In/  
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**TO RESPOND TO THIS LETTER:** Go to [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp). Please wait 48-72 hours from the issue/ mailing date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail [TEAS@uspto.gov](mailto:TEAS@uspto.gov). For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

**All informal e-mail communications relevant to this application will be placed in the official application record.**

**WHO MUST SIGN THE RESPONSE:** It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

**TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS:** Use the TEAS form at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>.

**To:** NEW WAVE INNOVATIONS, INC ([Johnf75712@aol.com](mailto:Johnf75712@aol.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86304665 - MR. FOAMER - N/A  
**Sent:** 9/23/2014 1:29:23 PM  
**Sent As:** ECOM103@USPTO.GOV  
**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**IMPORTANT NOTICE REGARDING YOUR  
U.S. TRADEMARK APPLICATION**

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED  
ON **9/23/2014** FOR U.S. APPLICATION SERIAL NO. 86304665

Please follow the instructions below:

**(1) TO READ THE LETTER:** Click on this [link](#) or go to <http://tsdr.uspto.gov>, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

**(2) TIMELY RESPONSE IS REQUIRED:** Please carefully review the Office action to determine (1) how to respond, and (2) the applicable response time period. Your response deadline will be calculated from **9/23/2014** (*or sooner if specified in the Office action*). For information regarding response time periods, see <http://www.uspto.gov/trademarks/process/status/responsetime.jsp>.

**Do NOT hit "Reply" to this e-mail notification, or otherwise e-mail your response** because the USPTO does NOT accept e-mails as responses to Office actions. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System (TEAS) response form located at [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp).

**(3) QUESTIONS:** For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail [TSDR@uspto.gov](mailto:TSDR@uspto.gov).

**WARNING**

**Failure to file the required response by the applicable response deadline will result in the ABANDONMENT of your application.** For more information regarding abandonment, see

<http://www.uspto.gov/trademarks/basics/abandon.jsp>.

**PRIVATE COMPANY SOLICITATIONS REGARDING YOUR APPLICATION:** Private companies **not** associated with the USPTO are using information provided in trademark applications to mail or e-mail trademark-related solicitations. These companies often use names that closely resemble the USPTO and their solicitations may look like an official government document. Many solicitations require that you pay “fees.”

Please carefully review all correspondence you receive regarding this application to make sure that you are responding to an official document from the USPTO rather than a private company solicitation. All official USPTO correspondence will be mailed only from the “United States Patent and Trademark Office” in Alexandria, VA; or sent by e-mail from the domain “@uspto.gov.” For more information on how to handle private company solicitations, see [http://www.uspto.gov/trademarks/solicitation\\_warnings.jsp](http://www.uspto.gov/trademarks/solicitation_warnings.jsp).

## EXHIBIT B

**To:** NEW WAVE INNOVATIONS, INC ([Johnf75712@aol.com](mailto:Johnf75712@aol.com))

**Subject:** U.S. TRADEMARK APPLICATION NO. 86303800 - MR. FOAMER  
CARTOON CHARACTURE IN - N/A

**Sent:** 9/23/2014 1:27:59 PM

**Sent As:** ECOM103@USPTO.GOV

**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 86303800	
MARK: MR. FOAMER CARTOON CHARACTURE IN	<b>*86303800*</b>
<b>CORRESPONDENT ADDRESS:</b> JOHN H. FARO FARO & ASSOCIATES 1395 BRICKELL AVE STE 800 MIAMI, FL 33131-3302	<b>CLICK HERE TO RESPOND TO THIS LETTER</b> <a href="http://www.uspto.gov/trademarks/teas/response">http://www.uspto.gov/trademarks/teas/response</a>  <a href="#">VIEW YOUR APPLICATION FILE</a>
APPLICANT: NEW WAVE INNOVATIONS, INC	
<b>CORRESPONDENT'S REFERENCE/DOCKET NO :</b> N/A <b>CORRESPONDENT E-MAIL ADDRESS:</b> <a href="mailto:Johnf75712@aol.com">Johnf75712@aol.com</a>	

**OFFICE ACTION**

**STRICT DEADLINE TO RESPOND TO THIS LETTER**

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW.

**ISSUE/MAILING DATE: 9/23/2014**

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62, 2.65(a); TMEP §§711, 718.03.

**SEARCH OF OFFICE'S DATABASE OF MARKS**

The Office records have been searched and there are no similar registered or pending marks that would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

However, applicant must address the following issue(s).

### **DESCRIPTION OF MARK INCOMPLETE**

The description of the mark is accurate but incomplete because it does not describe all the significant aspects of the applied-for mark. Applications for marks not in standard characters must include an accurate and concise description of the entire mark that identifies literal elements as well as any design elements. *See* 37 C.F.R. §2.37; TMEP §§808 *et seq.*

Therefore, applicant must provide a more complete description of the applied-for mark. The following is suggested:

**The mark consists of the design of a cartoon figure on a piece of paper with a hat, eyebrows, eyes, ears, face, mouth, and hands. Under the face appear the terms CHRISTMAS WISHES FROM MR. FOAMER.**

### **DRAWING IN COLOR BUT COLOR NOT CLAIMED**

Applicant submitted a drawing showing the mark in color but appears to have identified the mark as non-color in the application form and has not provided a color claim or mark description referencing color. 37 C.F.R. §2.52(b)(1); TMEP §807.07(b). Applications for marks depicted in color must include a complete list of all the colors claimed as a feature of the mark and a description of the literal and design elements that specifies where the colors appear in those elements. 37 C.F.R. §§2.37, 2.52(b)(1); *see* TMEP §§807.07(a) *et seq.*

Therefore, applicant must clarify whether color is claimed as a feature of the mark by satisfying one of the following:

(1) If color is **not a feature of the proposed mark**, applicant must submit a substitute black and white drawing of the mark to replace the color drawing of record. Amendments or changes to the mark will not be accepted if the changes would materially alter the mark. 37 C.F.R. §2.72(a)(2); TMEP §807.14. However, amending the drawing to delete color would not be considered a material alteration of the mark in this case.; or

(2) If color **is a feature of the proposed mark**, applicant must submit a statement listing all of the colors claimed as a feature of the mark and a statement describing the literal and design elements in the mark that specifies where the colors appear in those elements. *See* 37 C.F.R. §§2.37, 2.52(b)(1); TMEP §§807.07(a) *et seq.* If any portion of the black, white and/or gray appearing in the mark is not being claimed as color, applicant must also include a statement that the color(s) <black, white and/or gray> represent background, outlining, shading and/or transparent areas and are not part of the mark. TMEP §807.07(d). The following format is suggested: **“The colors blue, black, white, red, and gray are claimed as a feature of the mark. The mark consists of the following: a blue background with white flakes of snow; a white cartoon body outlined in black with a red hat, blue eyes outlined in black with white inside the eyes, black eye brows, gray and black mouth, face and ears; red hands with black outlining; and the terms CHRISTMAS WISHES FROM MR. FOAMER in red.”**

## **CONSENT STATEMENT NOT NECESSARY**

Applicant's statement regarding the name, portrait or signature of a living individual identified in the mark will not be printed on any registration that may issue from this application. The statement is unnecessary because the mark on its face would not reasonably be perceived as the name or likeness of a specific living individual. TMEP §§813.01(b), 1206.05.

## **SPECIMEN DOES NOT SHOW USE WITH ANY SERVICES**

Registration is refused because the specimen does not show the applied-for mark in use in commerce in connection with any of the goods and/or services specified in the application. 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a). Specifically, the specimen consists of a picture of a Christmas card bearing the mark. However, there is not a sufficient connection with the listed services of the application.

An application based on Trademark Act Section 1(a) must include a specimen showing the applied-for mark in use in commerce for each international class of goods and/or services identified in the application or amendment to allege use. 15 U.S.C. §1051(a)(1); 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); TMEP §§904, 904.07(a).

Examples of specimens for goods may include tags, labels, instruction manuals, containers, and photographs that show the mark on the actual goods or packaging, or displays associated with the actual goods at their point of sale. *See* TMEP §§904.03 *et seq.* Webpages may also be specimens for goods when they include a picture or textual description of the goods associated with the mark and the means to order the goods. TMEP §904.03(i). Examples of specimens for services may include advertising and marketing materials, brochures, photographs of business signage and billboards, and website printouts that show the mark used in the actual sale, rendering, or advertising of the services. *See* TMEP §§1301.04 *et seq.*

Applicant may respond to this refusal by satisfying one of the following:

- (1) Submit a different specimen (a verified "[substitute](#)" [specimen](#)) that (a) was in actual use in commerce at least as early as the filing date of the application or prior to the filing of an amendment to allege use and (b) shows the mark in actual use in commerce for the goods and/or services identified in the application.
- (2) Amend the filing basis to [intent to use under Section 1\(b\)](#), for which no specimen is required. This option will later necessitate additional fee(s) and filing requirements such as providing a specimen at a subsequent date.

For an overview of *both* response options referenced above and instructions on how to satisfy either option online using the Trademark Electronic Application System (TEAS) form, please go to <http://www.uspto.gov/trademarks/law/specimen.jsp>.

/Sung In/  
Sung In  
Law Office 103

Phone: (571) 272-9097  
Fax: (571) 272-9103  
Email: sung.in@uspto.gov

**TO RESPOND TO THIS LETTER:** Go to [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp). Please wait 48-72 hours from the issue/ mailing date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail [TEAS@uspto.gov](mailto:TEAS@uspto.gov). For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

**All informal e-mail communications relevant to this application will be placed in the official application record.**

**WHO MUST SIGN THE RESPONSE:** It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

**PERIODICALLY CHECK THE STATUS OF THE APPLICATION:** To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

**TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS:** Use the TEAS form at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>.

**To:** NEW WAVE INNOVATIONS, INC ([Johnf75712@aol.com](mailto:Johnf75712@aol.com))  
**Subject:** U.S. TRADEMARK APPLICATION NO. 86303800 - MR. FOAMER  
CARTOON CHARACTURE IN - N/A  
**Sent:** 9/23/2014 1:28:00 PM  
**Sent As:** ECOM103@USPTO.GOV  
**Attachments:**

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)**

**IMPORTANT NOTICE REGARDING YOUR  
U.S. TRADEMARK APPLICATION**

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED  
ON **9/23/2014** FOR U.S. APPLICATION SERIAL NO. 86303800

Please follow the instructions below:

**(1) TO READ THE LETTER:** Click on this [link](#) or go to <http://tsdr.uspto.gov>, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

**(2) TIMELY RESPONSE IS REQUIRED:** Please carefully review the Office action to determine (1) how to respond, and (2) the applicable response time period. Your response deadline will be calculated from **9/23/2014** (*or sooner if specified in the Office action*). For information regarding response time periods, see <http://www.uspto.gov/trademarks/process/status/responsetime.jsp>.

**Do NOT hit "Reply" to this e-mail notification, or otherwise e-mail your response** because the USPTO does NOT accept e-mails as responses to Office actions. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System (TEAS) response form located at [http://www.uspto.gov/trademarks/teas/response\\_forms.jsp](http://www.uspto.gov/trademarks/teas/response_forms.jsp).

**(3) QUESTIONS:** For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail [TSDR@uspto.gov](mailto:TSDR@uspto.gov).

**WARNING**

**Failure to file the required response by the applicable response deadline will result in the**

**ABANDONMENT of your application.** For more information regarding abandonment, see <http://www.uspto.gov/trademarks/basics/abandon.jsp>.

**PRIVATE COMPANY SOLICITATIONS REGARDING YOUR APPLICATION:** Private companies **not** associated with the USPTO are using information provided in trademark applications to mail or e-mail trademark-related solicitations. These companies often use names that closely resemble the USPTO and their solicitations may look like an official government document. Many solicitations require that you pay “fees.”

Please carefully review all correspondence you receive regarding this application to make sure that you are responding to an official document from the USPTO rather than a private company solicitation. All official USPTO correspondence will be mailed only from the “United States Patent and Trademark Office” in Alexandria, VA; or sent by e-mail from the domain “@uspto.gov.” For more information on how to handle private company solicitations, see [http://www.uspto.gov/trademarks/solicitation\\_warnings.jsp](http://www.uspto.gov/trademarks/solicitation_warnings.jsp).

## EXHIBIT C

# Trademark/Service Mark Application, Principal Register

Serial Number: 86108666

Filing Date: 11/02/2013

The table below presents the data as entered.

Input Field	Entered
<b>SERIAL NUMBER</b>	86108666
<b>MARK INFORMATION</b>	
<b>*MARK</b>	<a href="#">MR. FOAMER</a>
<b>STANDARD CHARACTERS</b>	YES
<b>USPTO-GENERATED IMAGE</b>	YES
<b>LITERAL ELEMENT</b>	MR. FOAMER
<b>MARK STATEMENT</b>	The mark consists of standard characters, without claim to any particular font, style, size, or color.
<b>REGISTER</b>	Principal
<b>APPLICANT INFORMATION</b>	
<b>*OWNER OF MARK</b>	Mr. Foamer, Inc.
<b>*STREET</b>	164 Barbados Drive
<b>*CITY</b>	Jupiter
<b>*STATE (Required for U.S. applicants)</b>	Florida
<b>*COUNTRY</b>	United States
<b>*ZIP/POSTAL CODE (Required for U.S. applicants only)</b>	33458
<b>LEGAL ENTITY INFORMATION</b>	
<b>TYPE</b>	corporation

<b>STATE/COUNTRY OF INCORPORATION</b>	Florida
<b>GOODS AND/OR SERVICES AND BASIS INFORMATION</b>	
<b>INTERNATIONAL CLASS</b>	003
<b>* IDENTIFICATION</b>	car wash cleaning and polishing preparations
<b>FILING BASIS</b>	SECTION 1(b)
<b>INTERNATIONAL CLASS</b>	035
<b>* IDENTIFICATION</b>	sale of car wash equipment and parts thereof including sale of equipment of others
<b>FILING BASIS</b>	SECTION 1(a)
<b>FIRST USE ANYWHERE DATE</b>	At least as early as 08/10/2012
<b>FIRST USE IN COMMERCE DATE</b>	At least as early as 08/10/2012
<b>SPECIMEN FILE NAME(S)</b>	
<b>ORIGINAL PDF FILE</b>	<a href="#">SPE0-1-5015421256-113543527_._Class035.pdf</a>
<b>CONVERTED PDF FILE(S) (1 page)</b>	<a href="#">\\TICRS\EXPORT16\IMAGEOUT16\861\086\86108666\xml1\APP0003.JPG</a>
<b>SPECIMEN DESCRIPTION</b>	brochure sent to customers showing use of the mark used in connection with the services
<b>INTERNATIONAL CLASS</b>	037
<b>* IDENTIFICATION</b>	installation and maintenance of car wash equipment and parts thereof
<b>FILING BASIS</b>	SECTION 1(a)
<b>FIRST USE ANYWHERE DATE</b>	At least as early as 11/02/2013
<b>FIRST USE IN COMMERCE DATE</b>	At least as early as 11/02/2013
<b>SPECIMEN FILE NAME(S)</b>	
<b>ORIGINAL PDF FILE</b>	<a href="#">SPE0-5015421256-113543527_._MrFoamerSpecimen.pdf</a>

<b>CONVERTED PDF FILE(S) (1 page)</b>	<a href="\\TICRS\EXPORT16\IMAGEOUT16\861\086\86108666\xml1\APP0004.JPG">\\TICRS\EXPORT16\IMAGEOUT16\861\086\86108666\xml1\APP0004.JPG</a>
<b>SPECIMEN DESCRIPTION</b>	excerpts from the applicant's website showing use of the mark in connection with the services
<b>ATTORNEY INFORMATION</b>	
<b>NAME</b>	Isabelle Jung
<b>ATTORNEY DOCKET NUMBER</b>	7305-004T
<b>FIRM NAME</b>	Carey Rodriguez Greenberg & O'Keefe LLP
<b>INTERNAL ADDRESS</b>	Suite 520
<b>STREET</b>	7900 Glades Rd
<b>CITY</b>	Boca Raton
<b>STATE</b>	Florida
<b>COUNTRY</b>	United States
<b>ZIP/POSTAL CODE</b>	33434
<b>PHONE</b>	5619223845
<b>EMAIL ADDRESS</b>	pto@crgolaw.com
<b>AUTHORIZED TO COMMUNICATE VIA EMAIL</b>	Yes
<b>OTHER APPOINTED ATTORNEY</b>	Steven Greenberg
<b>CORRESPONDENCE INFORMATION</b>	
<b>NAME</b>	Isabelle Jung
<b>FIRM NAME</b>	Carey Rodriguez Greenberg & O'Keefe LLP
<b>INTERNAL ADDRESS</b>	Suite 520
<b>STREET</b>	7900 Glades Rd
<b>CITY</b>	Boca Raton
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<b>COUNTRY</b>	United States
<b>ZIP/POSTAL</b>	

<b>CODE</b>	33434
<b>PHONE</b>	5619223845
<b>EMAIL ADDRESS</b>	pto@crgolaw.com;ijung@crgolaw.com
<b>AUTHORIZED TO COMMUNICATE VIA EMAIL</b>	Yes
<b>FEE INFORMATION</b>	
<b>NUMBER OF CLASSES</b>	3
<b>FEE PER CLASS</b>	325
<b>*TOTAL FEE DUE</b>	975
<b>*TOTAL FEE PAID</b>	975
<b>SIGNATURE INFORMATION</b>	
<b>SIGNATURE</b>	/Isabelle Jung/
<b>SIGNATORY'S NAME</b>	Isabelle Jung
<b>SIGNATORY'S POSITION</b>	Attorney of record, New York bar member
<b>DATE SIGNED</b>	11/02/2013

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## Trademark/Service Mark Application, Principal Register

**Serial Number: 86108666**

**Filing Date: 11/02/2013**

### To the Commissioner for Trademarks:

**MARK:** MR. FOAMER (Standard Characters, see [mark](#))

The literal element of the mark consists of MR. FOAMER.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Mr. Foamer, Inc., a corporation of Florida, having an address of

164 Barbados Drive  
Jupiter, Florida 33458  
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 003: car wash cleaning and polishing preparations

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

International Class 035: sale of car wash equipment and parts thereof including sale of equipment of others

In International Class 035, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 08/10/2012, and first used in commerce at least as early as 08/10/2012, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) brochure sent to customers showing use of the mark used in connection with the services.

#### **Original PDF file:**

[SPE0-1-5015421256-113543527\\_.\\_Class035.pdf](#)

#### **Converted PDF file(s) (1 page)**

[Specimen File1](#)

International Class 037: installation and maintenance of car wash equipment and parts thereof

In International Class 037, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 11/02/2013, and first used in commerce at least as

early as 11/02/2013, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) excerpts from the applicant's website showing use of the mark in connection with the services.

**Original PDF file:**

[SPE0-5015421256-113543527\\_. MrFoamerSpecimen.pdf](#)

**Converted PDF file(s) (1 page)**

[Specimen File1](#)

**The applicant's current Attorney Information:**

Isabelle Jung and Steven Greenberg of Carey Rodriguez Greenberg & O'Keefe LLP

Suite 520  
7900 Glades Rd  
Boca Raton, Florida 33434  
United States

The attorney docket/reference number is 7305-004T.

**The applicant's current Correspondence Information:**

Isabelle Jung  
Carey Rodriguez Greenberg & O'Keefe LLP  
Suite 520  
7900 Glades Rd  
Boca Raton, Florida 33434  
5619223845(phone)  
pto@crgolaw.com;ijung@crgolaw.com (authorized)

A fee payment in the amount of \$975 has been submitted with the application, representing payment for 3 class(es).

**Declaration**

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

**Declaration Signature**

Signature: /Isabelle Jung/ Date: 11/02/2013

Signatory's Name: Isabelle Jung

Signatory's Position: Attorney of record, New York bar member

RAM Sale Number: 86108666

RAM Accounting Date: 11/04/2013

Serial Number: 86108666

Internet Transmission Date: Sat Nov 02 12:25:38 EDT 2013

TEAS Stamp: USPTO/BAS-50.154.212.56-2013110212253890

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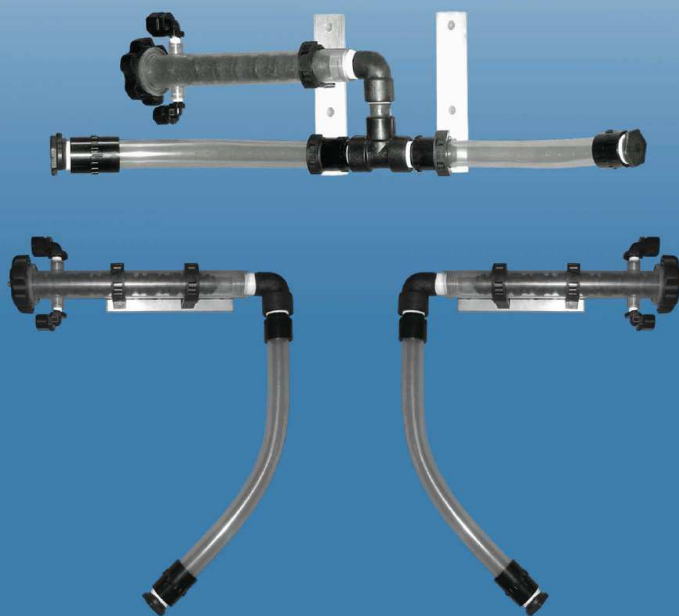
C-7080-20131102113543527066

**MR. FOAMER**

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For Information Contact Tim Smith • 1-888-905-6600  
[www.mrfoamer.com](http://www.mrfoamer.com)

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- Complete design and installation of Mr. Foamer™ equipment.
- 3rd party equipment installation including: Tunnels, Self Serve, Automatic's, and Fleet wash.
- Turn key building and tunnel install's featuring The Tommy building.
- Equipment service and maintenance for all types of wash facilities.

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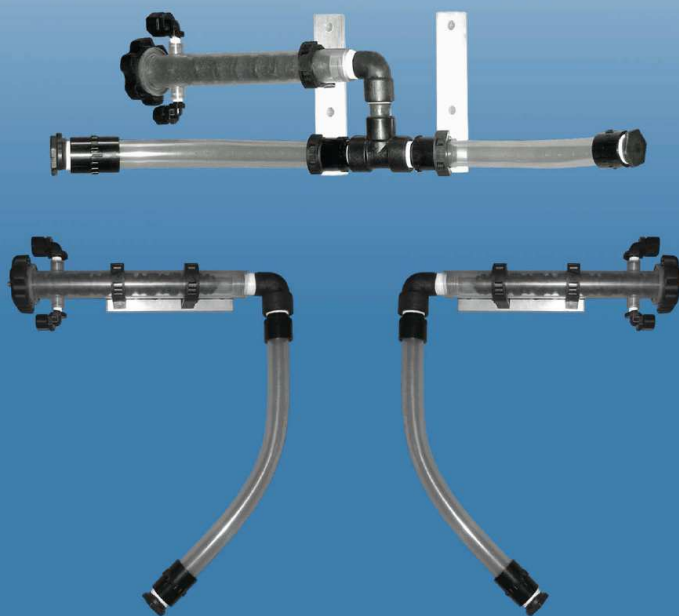
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**Twist n' SAVE Hybrid TRI COLOR  
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Mr. Foamer™ Wax's and Soap's specially formulated for the Foaminator™ System and all equipment.

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